Supreme Court, U.S.
FILED
SEP 7 1995
CLERK

No. 95-41

In the Supreme Court of the United States

OCTOBER TERM, 1995

STEPHEN A. ZIMMERMAN, PETITIONER

v.

OFFICERS FOR JUSTICE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in affirming the district court's denial of petitioner's motion to intervene pursuant to Rule 24, Fed. R. Civ. P.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is unreported, but the decision is noted at 52 F.3d 334 (Table). The order of the district court (Pet. App. 1b-2b) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 13, 1995. The petition for a writ of certiorari was filed on July 7, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Individual plaintiffs and the Officers for Justice, an organization representing various minority interests, filed suit alleging racial and sexual discrimination in the employment practices of the San Francisco Police Department. The San Francisco Police Officers Association (POA), a union representing member police officers, intervened as a defendant. The United States subsequently filed suit alleging that the Department had engaged in discriminatory employment practices. The suits were consolidated. Pet. App. 2a.

In 1979, all parties, including the POA, signed a consent decree that was approved by the district court. See *Officers for Justice* v. *Civil Serv. Comm'n of City & County of San Francisco*, 473 F. Supp. 801 (N.D. Cal. 1979), aff'd, 688 F.2d 615 (9th Cir. 1982), cert. denied, 459 U.S. 1217 (1983). In explaining its approval of the parties' agreement, the district court noted that "[b]lacks, Hispanics and Asians were and continue to be substantially underrepresented," particularly among higher-ranking officers, 473 F. Supp. at 804; that written examinations for promotion "displayed a substantial adverse statistical impact on minorities who took them" and had not been shown to be job-related, *ibid.*; that other selection criteria had a significant adverse impact on minorities and women, *id.* at 804-805; and that "substantial evidence of intentional discrimination was presented to th[e] court" during the litigation, *id.* at 805. The court also observed that the consent decree "includes no racial quotas or preferences" but rather "emphasizes equal opportunity in the future, not redress for past wrongs." *Id.* at 808. The decree required the City to

make a specified number of promotions and prohibited it from using hiring and promotional practices that would have an adverse impact on women and minorities. Pet. App. 2a.

Because of delays in administering promotional examinations, the district court in 1986 entered a "Supplemental Order" pursuant to an agreement of the parties. Pet. App. 3a. Recognizing that "[t]he review procedures afforded * * * individual officers * * * ha[d] been recurrent sources of delay," the parties agreed, *inter alia*, to bar individual officers from challenging the "appropriateness or adequacy of the various components of a particular examination procedure." *Ibid.* By 1989, however, most of the required promotions still had not been made. *Ibid.* The district court therefore held a hearing and ruled that the consent decree would not terminate automatically, but only with its approval. *Id.* at 3a-4a. The parties and their experts worked together over a four-year period to develop and administer a lieutenant's promotional examination. *Id.* at 4a. That examination was given in April 1993. *Ibid.*

2. Petitioner, a white police officer and POA member who ranked 193 out of 255 candidates taking the examination, filed a motion to intervene as a matter of right, see Fed. R. Civ. P. 24(a), and for permissive intervention, see Fed. R. Civ. P. 24(b). He sought to challenge the design, administration, and scoring of the lieutenant's examination and to argue that the promotional examination had an adverse impact on white males. The district court denied petitioner's motion, finding that (1) the examination did not have an adverse impact on white males; (2) petitioner had been adequately represented by the POA;

(3) intervention would cause inevitable delay; (4) petitioner's low ranking on the examination made him ineligible for promotion; and (5) petitioner's challenge to the examination was barred by the Supplemental Order. Pet. App. 4a-5a.

3. The court of appeals affirmed. Pet. App. 1a-8a. The court first set forth the four-part test governing applications for intervention as of right:

> Under Federal Rule of Civil Procedure 24(a)(2), an applicant is entitled to intervene as a matter of right if: (1) the application for intervention is timely; (2) the applicant has an interest in the transaction which is the subject matter of the pending litigation; (3) the applicant's ability to protect his interest would be impaired unless intervention were allowed; and (4) the applicant's interest is not adequately represented by the present parties.

Id. at 5a. Insofar as petitioner sought to contest the legality of the consent decree and its implementation by the district court, the court of appeals held that his application was untimely. *Id.* at 5a-6a. The court explained that petitioner, "a police officer since 1977 and member of the POA, should have brought this challenge when the supplemental order was entered in 1989." *Ibid.* The court held that petitioner's application to intervene was timely insofar as he sought to challenge the design and administration of the 1993 examination, since petitioner "could have no knowledge of any alleged testing improprieties until after the test was administered." *Id.* at 5a. The court concluded, however, that with respect to that claim petitioner failed to satisfy the last two requirements of the four-part test, see *id.* at 6a, since the POA

could be expected to protect his interests in valid test design and administration, *id.* at 7a. The court observed that petitioner "ha[d] failed to suggest any credible reason why he and the POA would not share a common interest in ensuring union members are promoted through a fair and just testing procedure" or that he would "offer any necessary element to the proceedings that other parties would neglect." *Ibid.* Finally, the court of appeals affirmed the denial of permissive intervention based on the district court's finding that petitioner's participation would "'inevitably' prejudice the rights of the parties, and further complicate and delay this highly complex case." *Id.* at 8a.

ARGUMENT

1. "[T]he decision on any particular motion to intervene * * * is always to some extent bound up in the facts of the particular case," and such decisions are generally unlikely to raise legal issues warranting review by this Court. *Kaisha* v. *U.S. Philips Corp.*, 114 S. Ct. 425, 428 (1993). Here, the court of appeals affirmed the district court's denial of intervention based on its findings that (1) the POA adequately represented petitioner's interest with regard to the 1993 promotional examination and (2) petitioner's attack on the consent decree and Supplemental Order was untimely.[1] The court of appeals'

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[1] Petitioner obscures the issue by arguing that he "would surely have added a 'necessary element to the proceedings that the other parties would neglect,' namely, a challenge to the Consent Decree on constitutional grounds of equal protection and due process." Pet. 17 (quoting Pet. App. 7a). The court of appeals squarely held that petitioner's application to intervene as of right was *untimely* insofar as petitioner sought to

decision is correct, and this Court's review of that decision would not result in the enunciation of any new principle of law. The petition for a writ of certiorari should therefore be denied. See *ibid.*[2]

2. Petitioner's principal argument (see Pet. 8) is that the Court should grant certiorari in order to consider the lawfulness of the consent decree and Supplemental Order in light of its recent decisions in *Adarand Constructors, Inc.* v. *Peña*, 115 S. Ct. 2097 (1995); *Missouri* v. *Jenkins*, 115 S. Ct. 2038 (1995); and *Miller* v. *Johnson*, 115 S. Ct. 2475 (1995). The court of appeals did not address petitioner's contentions on the merits, however; its ruling was limited to affirmance of the district court's denial of leave to intervene. See

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challenge the consent decree and its implementation by the district court. See Pet. App. 5a-6a. The court of appeals' determination that petitioner's interests would be adequately protected by the POA applied only to petitioner's attack on the design and administration of the 1993 examination, see *id.* at 6a-7a—the aspect of petitioner's challenge that the court had found to be timely, see *id.* at 5a.

[2] Contrary to petitioner's suggestion (Pet. 17-18), the decision below is not in conflict with *Barfus* v. *City of Miami*, 936 F.2d 1182 (11th Cir. 1991), or *O'Shea* v. *City of San Francisco*, 966 F.2d 503 (9th Cir. 1992). The plaintiffs in *Barfus* and *O'Shea* did not seek to intervene in ongoing litigation, nor did they challenge the terms of a consent decree. Rather, the courts in both cases simply held that the existence of a consent decree did not prevent the plaintiffs from filing new lawsuits challenging individual employment decisions that were neither required nor prohibited by the decree itself. See *Barfus*, 936 F.2d at 1185-1189; *O'Shea*, 966 F.2d at 505-506. Moreover, *O'Shea* is a prior decision of the same court of appeals that decided the present case. Nor is there any basis for petitioner's unsupported assertion (Pet. 19) that the circuits are in conflict regarding the criteria for permissive intervention.

Pet. App. 8a n.7. Questions concerning the legality of the consent decree and implementing orders are therefore not appropriate for this Court's review. Petitioner's reliance on *Kaisha* v. *U.S. Phillips Corp.*, *supra* (see Pet. 15-16), is wholly misplaced. Despite petitioner's assertion, *Kaisha* did not hold that "[w]here the Court is likely to enunciate an important new principle of law, it should grant certiorari to review the intervention issue also." Pet. 16. To the contrary, the Court in *Kaisha* dismissed the writ of certiorari as improvidently granted rather than address an antecedent intervention question. See 114 S. Ct. at 428.[3]

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[3] In any event, this Court's recent decisions in *Adarand*, *Jenkins*, and *Miller* are of little relevance to petitioner's constitutional challenge to the consent decree and Supplemental Order. None of those cases involved a consent decree or comparable voluntary effort to redress the effects of state or local employment discrimination. Petitioner's substantial reliance on *Jenkins* (see Pet. 12-14) is particularly misplaced. See, *e.g.*, *Local No. 93, Int'l Ass'n of Firefighters* v. *City of Cleveland*, 478 U.S. 501, 522-523 (1986) (because "it is the agreement of the parties, rather than the force of the law upon which the complaint was originally based, that creates the obligations embodied in a consent decree," the statutory limitations that restrict a court's power to award relief after trial "simply do not apply when the obligations are created by a consent decree"). Cf. *Rufo* v. *Inmates of Suffolk County Jail*, 502 U.S. 367, 392 (1992) ("state and local officers in charge of institutional litigation may agree to do more than that which is minimally required by the Constitution to settle a case and avoid further litigation").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1995